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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 128

IN BANKRUPTCY.

ALVIN EMMETT SKINNER, *Petitioner*,

vs.

WILBUR L. DINGWELL, *Respondent*.

RESISTANCE AND ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF OF RESPONDENT IN SUPPORT THEREOF.

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STIPP, PERRY, BANNISTER & STARZINGER,
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RESISTANCE AND ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To: The Honorable Harlan F. Stone, Chief Justice, and to the Associate Justices, of the Supreme Court of the United States:

Your respondent, Wilbur L. Dingwell, respectfully asks this Honorable Court to deny the Writ of Certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered in the above entitled cause on March 31, 1943, which decision confirms the judgment of the United States District Court for the Southern District of Iowa, Central Division.

STATEMENT OF FACTS.

1. The statement of facts by the appellant, Alvin Emmett Skinner, in the Appellant's Brief and Argument filed in the United States Circuit Court of Appeals was so distorted and colored as to make necesssary a restatement of facts by the appellee. Again it becomes necessary to make such a restatement of facts.

2. The petitioner is not the owner and operator of a farm but merely has a contingent life estate in a farm with his sister, the life estate for the petitioner and his sister being subject to the life estate of their mother, who is still living, and said petitioner rents said farm from his mother, the present life tenant. The respondent has absolutely no interest in the farm real estate, but held a mortgage on a business building situated in the Town of Adel, Iowa.

3. The petitioner lived on a farm when he was a boy, but has not lived on a farm for more than forty-one years. He has lived in the Town of Adel, Iowa, for the past forty-one years with the exception of two years, from 1907 to 1909, when he lived in Chicago. (R. 15.) From 1909 to the date of his father's death in 1932, he worked with his father in the implement and hardware business in Adel. After that, as executor of his father's estate, he operated the store and the farm, and everything connected with the estate for five years. His father had a lumber yard in addition to the hardware and implement business. (R. 15.)

After appellant ceased being executor of his father's estate, he continued to run the store in the same storeroom (R. 15), and he also engaged in the plumbing and heating business. Sold and handled harness (R. 40) and operated a sawmill located back of the storeroom. (R. 16.) He does plumbing work, furnace work, and advertises in the paper for such work. (R. 16.) He testified, "I did most of the labor, installing furnaces, and plumbing, and fixing oil burners". (R. 40, bottom of page.) He kept open the storeroom in Adel equipped with counters and shelving and has been operating

this store continuously since January of 1940. (R. 16.) The following is from his testimony before the conciliation commissioner: "In schedule B2, stock in trade, merchandise and supplies, at $500.00. That is the stock that I have in the store, for sale in the regular course of business. I have been operating the store since I filed the petition. I have some shelving and fixtures in the store. They are listed as personal property. When I filed the schedules I just estimated the inventory. The money from the merchandise I have sold, I have put in the bank, which was probably used to pay bills since I filed this petition. I have done some other work since I filed the petition, sold a furnace and installed it. I have another on the way. I have another way of making money, by operating a sawmill." (R. 18.)

This proceeding in no way involved the farm he is renting. The appellant agreed to pay the indebtedness in full on the farm (R. 10; 27), and to pay every other creditor in full, except this appellee. (R. 10 and 11.)

The appellant did not take his exemptions out of his farming personal property, but in plumbing tools and the sawmill. (R. 8.) The Iowa exemption statute is Section 11760 of the Code of 1939, which provides:

> "If the debtor is a resident of this state and the head of a family, he may hold exempt from execution the following property:
>
> "6. Two cows and two calves.
>
> "7. Fifty sheep and the wool therefrom and the materials manufactured from such wool."
>
> "9. Five hogs, and all pigs under six months.
>
> "10. The necessary food for all animals exempt from execution for six months."
>
> "17. The *proper tools*, instruments, or books of the debtor, if a farmer, *mechanic*.
>
> "18. If the debtor is a * * * farmer, teamster, *or other laborer*, a team * * * and the wagon or other vehicle, with the *proper harness or tackle*, by the use of which he habitually earns his living." (Italics are ours.)

His lease is a peculiar one in this: in it he agrees to pay the taxes and interest and installment of principal on the mortgage, whether he makes it out of the farm or not. (R. 17.)

The debtor leases the farm from his mother, who owns a life estate and then operates said farm by hired help, with the exception of fifty or sixty days which he spends on the farm during the course of a year. (See R. 17.)

When he is not working on the farm, he is spending his time operating his business. (See R. 18.)

The gross sales from the farm were $2,828.09, and total expenses were $1,842.50, which leaves a profit of $985.59, as shown by Exhibit "D-2". (R. 44.)

The depreciation on farm machinery in the sum of $106.50 (R. 40) was not deducted as an item of expense, and after making such deduction there would be a net profit on the farm in the sum of $879.09.

Said debtor has the fixtures, plumbing tools, merchandise and sawmill which formerly belonged to his father, and the debtor keeps a store, makes purchases and sales in connection with operating said store, does plumbing work, furnace work, and advertises in the paper for such work, and has been operating said store continuously since January of 1940. Most of his business consists of plumbing and heating. (See R. 16.)

Said debtor keeps a stock in said store for sale in the regular course of business and has been operating the store since the filing of his petition. (See R. 18.)

The total sales in debtor's mercantile, plumbing, and heating business amounted to $4,737.58; the total purchases $3,221.51; total expense $733.72, thus leaving a net profit of $811.15. (See Exhibit "D-2", R. 44.)

In addition he operated a sawmill, situated at the rear of the store building, for which he received $339.00, and also had $150.00 income from a residence property during 1940, and $278.60 on the building located on Block 16, Adel, Iowa. From the rents collected, said debtor paid $119.58 for taxes,

coal and expenses, thus making his total net income from sources other than farming the sum of $1,459.17. (See R. 41.)

Therefore the total gross income of the debtor from his farming operation was $2,828.09, which was the total sales, including the total sales of all grain, livestock raised on farm, as well as the increase in the inventory in the sum of $435.00. From said sum have been deducted the expenses, including rent in the total sum of $1,842.50, leaving a profit in the sum of $985.59, less $106.50 depreciation on farm machinery, or a net profit of $879.09.

Set out in tabular form, debtor's income from operations other than farming is as follows:

Total sales	$4,737.58
Received from rent	428.60
Received from running sawmill	339.00
Increased inventory	28.80
Total gross income from other business	$5,533.98
Expenses:	
Purchases	$3,221.51
Expense of operating business	733.72
Taxes and other expense	119.58
Total expenses of other business	$4,074.81
Total income from other business brought forward	$5,533.98
Total expenses of other business brought forward	$4,074.81
Net profit from other business	$1,459.17

It can readily be seen by the facts that the foreclosure of the mortgage on the business property situated in Adel had no connection with the farm or the operation thereof in which the petitioner holds a contingent life estate with his sister, subject to the life estate of their mother.

REASONS RELIED ON FOR DENYING THE WRIT.

I.

Decision of Circuit Court of Appeals for the Eighth Circuit is not in conflict but in harmony with the decisions of many District Courts and with the spirit of the decisions of this Court in interpreting who is a farmer.

II.

The petitioner is not a farmer under any definition stated by this Court or any other Court of Appeals.

First National Bank v. *Beach*, 301 U. S. 435.
Shyvers v. *Security Bank*, (9th Cir.) 108 F. (2) 611.
In re Lindsay, (D. C. Texas 1941) 41 F. Sup. 948.
In re Henry Joyce, (D. C. La. 1941) 36 F. Sup. 113.
In re Prudhomme, (D. C. La.) 24 F. Sup. 155.
In re Day's Estate, (D. C. E. D. Illinois) 10 F. Sup. 229.
In re Hilliker, (D. C. S. D. Cal.) 9 F. Sup. 948.
Federal Land Bank of Omaha v. *Wood*, (C. C. A. 8) 129 F. (2) 89.
Benetez v. *Bank of Nova Scotia*, (1st Cir. 1942) 125 F. (2) 523.
In re Beechwood, (D. C. N. J.) 42 F. Sup. 401.
Williams v. *Great Southern Life Insurance Co.*, (5th Cir.) 124 F. (2) 38, 40.

III.

The burden of proving the facts necessary to sustain the jurisdiction of the Court rests on the petitioner.

McNutt v. *General Motors Corporation*, 298 U. S. 178.
McLaughlin Company v. *Bank*, (9th Cir.) 122 F. (2) 193.
In re Chaney, (D. C. W. Va.) 39 F. Sup. 696, 700.
Mulligan v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.

IV.

When a sheriff's deed has issued pending the proceedings and when no restraining order was in force and the debtor has lost interest in the property, the proceedings will be dismissed.

Hardt v. *Kirkpatrick*, 91 F. (2) 875.
In re Cox, (D. C. Idaho) 22 F. Sup. 925.
Federal Land Bank v. *Davis*, 128 F. (2) 435.
McLean v. *Federal Land Bank*, 130 F. (2) 123.

V.

The Court, not possessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act.

Mulligan v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.
Baxter v. *Savings Bank of Utica*, 92 F. (2) 404.
Cresap v. *Equitable Life Assurance Society of U. S.*, (7th Cir.) 99 F. (2) 722.

A. The appellant having filed no such designation cannot urge this point.

Rule 75d, Rules of Civil Procedure.

The question was not one of the points designated. (Record, page 71.)

WHEREFORE your respondent respectfully asks that the Writ of Certiorari be denied by this Honorable Court, and for such other and further relief as this Court may deem proper.

WILBUR L. DINGWELL, Respondent.
VINCENT STARZINGER,
ROBERT J. BANNISTER, and
RUSSELL K. CRAFT,
Attorneys for Respondent.

STIPP, PERRY, BANNISTER & STARZINGER,
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THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING:

1. That Alvin Emmett Skinner, out of the facts of the record and the law applied thereto, was not a farmer.

2. That because the sheriff's deed was issued while no injunction was in force, nor applied for, the subject of the controversy had passed the jurisdiction of the Bankruptcy Court.

3. The Circuit Court of Appeals was correct in affirming the opinion of the District Court, as the Court, not posessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act, and the petitioner having filed no such designation cannot now urge this point.

ARGUMENT.

I.

The appellant was not a farmer.

It is clearly established that each case, as to whether a debtor is a farmer or not, must depend on its peculiar facts and to have such a status, an individual must be primarily en-

gaged in farming. *First National Bank* v. *Beach*, 301 U. S. 435.

It certainly cannot be successfully maintained, that Skinner was primarily engaged in farming when according to his own testimony, he spent but fifty or sixty out of three hundred working days in each year in his farming activities and two hundred fifty of them at working at his business in town. *Benetez* v. *Bank of Nova Scotia*, (1942) 125 F. (2) 523; *First National Bank* v. *Beach*, 301 U. S. 435; *Shyvers* v. *Security Bank*, 108 F. (2) 611.

Obviously, the labor of appellant for 83⅓% of his time does not "smack" of the soil. See *First National Bank* v. *Beach*, 301 U. S. 435.

In the language of the Supreme Court in the case last above cited:

> "Either the debtor posing as a farmer was engaged at the same time in some other line of business or the plots in cultivation were too small to make a farm, and in such a case the court holds that he was not within the statutes."

Also the following from the *Beach* case is important:

> "The critical fact is that the debtor worked an acreage large enough to count, that he did not work at anything else, and that he gave to this work, whether profitable or unprofitable, *the major portion of his time.*" (Italics ours.)

The 9th Circuit Court of Appeals in the case of *Shyvers* v. *Security Bank*, (9th Cir.) 108 F. (2) 611, very carefully analyzes the *Beach* case. In the *Shyvers* case the debtor claiming to be a farmer derived all of her income from farming, but she had no personal activities on the farm, and the court held she was not a farmer, saying:

> " 'It should be noted in particular that the Act does not define a farmer as one whose principal income is derived from farm properties; but the definition instead refers to "the foregoing operations".

"'What are the "foregoing operations"? An examination of the statute will disclose that each "foregoing operation" is meticulously required to be a personal one. We conclude that to come within this subdivision, the debtor must personally be engaged in farming. It is not enough to own farm lands which he or she leases to others who operate them, while the debtor resides across the seas. And this appears to be the very spirit of the law, which was enacted during a period of profound depression among the farmers of this country, the Act itself providing that it is one of emergency.'"

The Circuit Court of Appeals for the 8th Circuit in *Federal Land Bank of Omaha* v. *Wood*, 129 F. (2) 89, holds that a school teacher, owning and leasing land to tenants in the State of Nebraska, is not a farmer, and says:

"Each case must be determined on its own individual facts and circumstances."

It has been held that the purpose of the alternative portions of the definition in Subsection *r* of this section of the statute is to prevent additional personal operations from defeating a debtor's status as a "farmer", provided debtor's principal income continued to come from debtor's personal farming operations. *In re Joyce*, (D. C. La. 1941) 36 F. Sup. 113.

In re Beechwood, 42 F. Sup. 401, was a case where a lawyer and a business man who resided on a farm and devoted his Saturday afternoons, Sundays, and leisure time to farming operations and where he ran the farm by hired help was not a farmer, the court saying:

"The exceptional benefits provided for farmers under the Bankruptcy Act were designed for the protection of those who in good faith seek their livelihood from the soil. Such workers engage in a totally essential employment beset by many economic risks and hazards and when personally engaged, even under most advantageous conditions, are required to exert themselves with utmost vigor for most modest returns. None but those for whom the statutory privilege was created should be permitted to insinuate themselves into the class."

The following from *Williams* v. *Great Southern Life Insurance Company,* (5th Cir.) 124 F. (2) 38, at page 40, is in point:

> "He does not become a farmer by merely receiving rents or revenues without more, where he has another business in which he is primarily engaged, although such rents and income may exceed that of such other business or occupation."

In the following from *In re Chaney,* (D. C. W. Va.) 39 F. Sup. 696, we find the word "primarily" defined:

> "It seems certain, however, that the use of the word *primarily* engaged means that the alleged farming operation must be the primary activities of the debtor and not a mere sideline to some other more important, lucrative and time-engaging occupation, and that when reference is made to the *principal part* of the debtor's income it is meant that one whose real means of livelihood is derived from some other source cannot obtain the protection of this act merely by dabbling in agricultural pursuits even though some income be derived therefrom." (This case was reversed by the Circuit Court of Appeals, but the definition of the word *"Primarily"* was not criticized or referred to in the opinion of the appellate court.)

Where debtor was a lawyer and operated a farm and his income as a lawyer was $1,000.00 a year and from the farm $450.00 a year, held he did not derive his principal source of income from farming and was not "primarily engaged in producing products of the soil". *In re Prudhomme,* (D. C. La.) 24 F. Sup. 155.

In re Day's Estate, (D. C. E. D. Illinois) 10 F. Sup. 229, it was held that a civil engineer who owned a farm and derived one-half of his income from the farm was not a farmer. The court said:

> "The court is of the opinion that there is little distinction between the phrase 'engaged chiefly in farming' and that of 'personally * * * engaged primarily in farming' or that of 'principal part of whose income is derived from farming operations.' Principal means main, chief, of first importance."

In re Hilliker, (D. C. S. D. Cal.) 9 F. Sup. 948, holds that a practicing dentist who derived the largest part of his income from a citrus ranch, was not a farmer.

The following cases cited by appellant, when analyzed, are not in conflict with the principles announced in those cases already discussed.

First State Bank of Stratford v. *Roach*, 124 F. (2) 325, cited by appellant, was the case of a woman who farmed two sections of land to wheat, through hired hands. She lived a part of the time in a shack on the farm and cooked for the men. She had no other occupation. Obviously she was a farmer.

In the case of *Leonard* v. *Bennett*, 116 F. (2) 128, cited by appellant, Bennett left his farm only temporarily and engaged in grazing livestock for wages. He went into the grazing business to support his family. All the while he had the intention of returning to the farm.

The distinction between *Hamburg Bank* v. *Kitchens*, (8th Cir.) 116 F. (2) 377, and the case at bar is shown by the following from the opinion in that case:

> "There is no suggestion that he has any occupation other than that noted. There is no proof of any other income."

On the other hand, appellant has never been a farmer. He left the farm forty-one years before he filed his petition in this case, then he was a farmer's boy, possibly doing a few chores around the place, but no one would class him as a farmer. He has lived in Adel ever since, except for two years he lived in Chicago and at no time had or claims to have had any connection with a farm until four years ago when he rented the farm which his father had owned, first from the administrator, and then from his mother. During all these years he was engaged in the lumber, hardware and implement business with his father. After his father's death, apparently not wishing to conduct a lumber business, or at least not conducting it, and having a reduced stock of hardware, he

branched out, *not* into farming but into plumbing and heating, in handling harness, together with the operation of a sawmill set up back of his store.

When he did rent the farm he did not do so for the purpose of earning a livelihood. This is shown by the fact that the rent was to be the amount of the taxes and the payments of principal and interest on the mortgage, whether the rent amounted to that much or not. The appellant guarantees that the rent will amount to enough to take care of the interest and taxes and payments on the farm, whether he makes it or not. (Record, bottom page 16, top page 17.) That this was a side issue is conceded by appellant in his argument on page 20, where he says:

> "It should be borne in mind the intent and purpose of this Debtor. He feels himself responsible for the care of his mother, an aged woman. She is liable on the debt held by Dingwell and the deficiency judgment which creditor is standing ready to grab her life estate in this farm if he can do so, by disposing of this bankruptcy proceedings." (Appellant's Argument bottom of page 20, top page 21.)

In other words his primary business is the business he has been following for forty-one years in the City of Adel as a businessman. The side issue of farming is of importance for the support of his mother and servicing the loan on the place so it will not be lost. This was a side line with him. On this activity he spent, according to his own claim, not more than fifty or sixty days in the year out of three hundred working days, not more than one-sixth of his time. The other 83% of his time was spent conducting a store and engaging in the mercantile pursuits in connection therewith of selling and servicing furnaces, selling harness, hardware, and farm seeds, together with plumbing and sawmill business.

When appellant says appellee will, if the order of the lower court is affirmed on this appeal, levy execution on and sell his mother's life estate in the farm under the deficiency judgment against her, he overlooks the law in such respect. This judgment was rendered on the 5th day of September,

1940. (R. 34.) The statutes of the State of Iowa provide that no execution can be issued on a deficiency judgment after two years from the entry thereof. Code of Iowa 1939, Section 11033.1 is as follows:

> "Execution on certain judgments prohibited. From and after January 1, 1934, no judgment in an action for the foreclosure of a real estate mortgage or deed of trust or in any action on a claim for rent or judgment assigned by a receiver of a closed bank or rendered upon credits assigned by the receiver of a closed bank when the assignee is not a trustee for depositors or creditors of the bank, the Reconstruction Finance Corporation or any other federal governmental agency to which the bank or the receiver is or may be indebted shall be enforced and no execution issued thereon and no force or vitality given thereto for any purpose other than as a set-off or counterclaim after the expiration of a period of two years from the entry thereof."

It therefore appears that there is no basis for this plea for sympathy in behalf of his mother.

If appellant was a farmer, he was entitled to a farmer's exemptions. If appellant was primarily bona fide personally engaged in farming, as he claimed, why did he not claim his farm tools and his livestock as exempt? He could have claimed all his machinery and livestock as exempt under Code Section 11760 of the Code of Iowa which is quoted hereinbefore in this argument. Instead of that, what does he do? In his schedules he claims as exempt his sawmill outfit, listed at $500.00, and wood-working tools at $150.00, a planer $50.00, and his plumbing tools $100.00. These do not sound like the implements of a husbandman.

The principal part of appellant's income was not derived from farming.

The evidence failed to show that the principal part of debtor's income is derived from farming. We believe on this question the net income must be considered, but whether net or gross, the principal part of his income comes from his business activities in the City of Adel and not from his farm-

ing operation. The gross income from his farming operations, as shown by Exhibit "D-2", the only and the final full year before he filed his petition in bankruptcy, was $2,828.09 as against other income in the sum of $5,533.98 and the net income from his farming operations was $879.09 as against net income from his business activities other than farming of $1,459.16. (See references to the Record hereinbefore set out in the statement of the case.)

If he claims that the debtor is personally engaged in farming, which he is for a few days in the year, then he fails to measure up to the provision that the principal part of his income must be derived from those operations, that is his operations in farming, because whether taken as the gross or as the net income, the principal part of his income is derived from other operations than farming. The figures given above are his own figures. They are for the last available year prior to the time he filed his petition in bankruptcy. He also presented figures for 1941, Exhibit "D-5". (Record 45.) This offer was objected to as incompetent, irrrelevant and immaterial to any issue in this case, for the reason that this hearing is based upon a petition filed by the debtor June 4, 1941. (Record 39, bottom of page.) The exhibit is undependable, because the petition in Bankruptcy was filed June 4, and any income he may have made after that date is immaterial. Accordingly the rent is not stated exactly therein and it had to be estimated. Finally, there is no amount included for rent from other property and if the same average was paid as during the preceding year and the same rate of depreciation applied to the farm machinery the income would be approximately equal from both sources. Clearly the plaintiff has not sustained the burden of establishing that his principal income was from farming.

II.

The burden of proving the facts necessary to sustain the jurisdiction of the court rested on appellant.

In a court of the United States it has been held without conflict in the authorities that the person asking relief must

establish, as part of his case, that the court has jurisdiction over the subject matter. A leading and well reasoned case announcing this rule is *McNutt* v. *General Motors Corporation*, 298 U. S. 178.

In the case of *McLaughlin Land & Livestock Company* v. *Bank of America National Trust & Savings Association*, (9th Cir.) 122 F. (2) 193, the court holds that in an agricultural bankruptcy which is based upon the claim in the petition that the debtor is a farmer under the provisions of Section 75 of the Bankruptcy Act, the burden of proving this fact rests on the debtor. A number of cases supporting the general rule that the burden of proving jurisdiction in the District Court of the United States rests upon the person asserting it are cited in the footnotes to the opinion.

In the nature of things, it must be true that the burden rests on the person who has the duty to plead and prove a fact in a court to sustain the relief prayed for.

III.

When a sheriff's deed has issued pending the proceedings and when no restraining order was in force and the debtor has lost the property in controversy, the proceedings will be dismissed.

Hardt v. *Kirkpatrick*, (9th Cir.) 91 F. (2) 875, was a case brought under Section 75 of the Bankruptcy Act. Pending the proceedings and when no injunction was in force, the property in question was sold under deed of trust. This was after the adjudication in bankruptcy. The court held that the court had no further jurisdiction and dismissed the proceedings. The court said:

> "In its opinion, the court below states that to approve the lienholder's foreclosure 'after it is done, is to sanction the flaunting of the power of the bankruptcy court—a flaunting which would destroy the effectiveness of the administration of the Bankruptcy Act.'
>
> "We cannot concur in this view, Section 75 (s) of the Bankruptcy Act itself provides a direct and orderly

means by which the court can prevent any such flaunting —the simple expedient of issuing a stay against the lienor's sale. Not having seen fit to do this, the District Court cannot complain of the flaunting of an authority that it did not choose to exercise."

In the case of *In re Cox*, (D. C. Idaho) 22 F. Sup. 925, there was a lapse of but two days between the filing of the petition in bankruptcy and the expiration of the period of redemption and when the expiration of the period had occurred a deed was issued, which the court held ousted the court of jurisdiction.

There is no deficiency judgment in this record against the bankrupt. He was not liable on the note secured by the mortgage. *McLean* v. *Federal Land Bank*, 130 F. (2) 123. The appellee claims no lien on the 140 acre farm as against appellant or his rights therein. How is he entitled to the intervention of a court of bankruptcy in protecting his mother's life estate when it is not claimed she was a farmer at all and she is not a party to this record nor in bankruptcy, nor asking such relief. The whole proceedings were not brought in good faith. They are not for the purpose of protecting a farm or farming operations, but for the purpose of keeping the appellant in possession of a store building in town and of the rent thereof.

The appellant asked for no stay order. He asked for no extension of the previous injunction pending appeal after the ruling of the lower court, ordering the proceedings dismissed. He stood by for two months and then did not appeal, but asked for a rehearing. There were seventeen days intervened between the time of the dismissing of his bankruptcy and the releasing of the injunction, during which appellant did nothing. (Record 53, 59.) On July 14, the court below entered an order setting aside the order of the Conciliation Commissioner and directed the commissioner to enter an order finding the debtor is not a farmer and proceed to wind up the administration of his estate. On July 21, 1942, the court vacated the injunction against the issuance of a sheriff's deed. It was

not until the 31st day of July that the debtor filed his application to restore the restraining order, in which he recites: "That this court did on the 21st day of July, 1942, upon the said application, grant an order, allowing the said Wilbur L. Dingwell and the Sheriff to proceed in the State Court." (Record 60.) It appears in the record and is not disputed that Wilbur L. Dingwell surrendered his certificate of purchase at Sheriff's sale to the Sheriff of Dallas County on the 22nd day of July, 1942, and received a deed to the store property in Adel described as

> The West One-Third (W⅓) of Lot One (1) and the East Twenty-Two (22) feet of Lot Two (2) Block Sixteen (16) in the Town of Adel. (Record 63.)

Under this situation the appellant has lost his right to claim that the court in bankruptcy in this proceeding should continue to stay or restore the stay against the issuance of a deed to the appellee. When the deed issued at a time when no injunction was in force, and no stay in force or applied for, the appellant's interest in the store building ceased.

IV.

This court, not possessing jurisdiction of the case, may not make an order transferring it with amendments to the pleadings, for administration under the Chandler Act.

The cases cited by appellant are cases where such prayer was included in the petition. There is no such prayer in plaintiff's petition in bankruptcy in this case. (Record 2.)

The Federal District Court is without jurisdiction of a proceeding for an agricultural composition or extension under Section 75 of the Bankruptcy Act, unless the debtor is engaged in farming operations. *Mulligan* v. *Federal Land Bank*, (8th Cir.) 129 F. (2) 438.

In the case of *Baxter* v. *Savings Bank of Utica, New York*, 92 F. (2) 404, it was held that Baxter was not a farmer and that the court should retain jurisdiction in general bankruptcy, because the petition prayed for a general adjudication.

In the case at bar Skinner's petition does not, its prayer is "Wherefore Your Petitioner Prays, That his petition may be approved by the Court and proceedings had in accordance with the provisions of said section." (Section 75.) (Record 2.)

In *Cresap* v. *Equitable Life Assurance Society of the United States*, (7th Cir.) 99 F. (2) 722, dismissal of the petition in an agricultural composition in bankruptcy was held warranted where the debtor had failed either to secure a composition or to ask for an adjudication.

The case of *Securities Commission* v. *Realty Company*, 310 U. S. 434, cited by appellant, merely holds that the Securities and Exchange Commission may appear and move to dismiss proceedings under Chapter 11, leaving the debtor free to proceed under Chapter 10, if so advised. It does not hold that the court has any jurisdiction to transfer the matter to Chapter 10 and to have the pleadings revised. It does hold that the court may dismiss the case under Chapter 11.

(A) It should also be noted in the case at bar that the appellant filed a designation of the points to be relied upon for reversal, before the Circuit Court of Appeals, in accordance with Rule 75d of the Rules of Procedure. (R. bottom page 71 to top of page 72.) The question presented under (b) and (c) of the argument for petitioner was nowhere mentioned in this designation. (R. 71, 72.) It should follow as a matter of course that the claimed error cannot now be considered, otherwise the provision for designation of errors merely becomes a snare to opposing counsel and to the court.

CONCLUSION.

The debtor was not primarily engaged in farming, neither did the major part of his income, whether considered as the net income or the gross income, arise from farming operations. He makes a claim to be a farmer, not in order to protect any interest he has in any farm, but to prevent the appellee from enforcing his lien against the store building in Adel, which he has occupied with his store and where until

recently he has spent all his time until he moved into another building owned by the estate up the street.

Appellant is not liable to appellee. Appellee has no judgment against appellant and no lien against appellant's contingent remainder in the farm after the termination of his mother's life estate.

This is not a debtor case where the debtor is in distress and about to lose his farm, but is purely a case of a merchant who is trying to derive certain benefits to which he is not entitled. This is clearly shown by the offer of composition made by said debtor, in that this petition was not filed in good faith, but for the purpose of hindering and delaying Wilbur L. Dingwell, who is not even a creditor of this debtor, as the debtor offers to pay all of his obligations in full, including the mortgage on the farm real estate. Skinner is not of the class of persons for whom the act of Congress was passed.

The petitioner in his argument on page 8 of his Petition for Writ of Certiorari attempts to deceive the court in the statements made therein by comparing the net income received from his business with the gross income from the farm. The true statement appears in the opinion, 134 Federal Reporter, 2nd Series 392, on page 393, as follows:

> "His total gross income from his farming operations during the year in question was $2,828.09, while his expenses, including rent, amounted to $1,842.50, leaving a profit of $985.59. This allows no depreciation on farm machinery. His total income from his operations in town amounted to $5,533.98, and his total expenses in connection therewith amounted to $4,074.81, leaving a net profit from these operations of $1,459.17."

So it can be readily ascertained that the gross profit from the petitioner's business was greater than the gross profit from any farm operations, and the net profit was greater in his business than the net profit from any farm operations. But the petitioner does not give this court a true picture in comparing the net profit of his business with the gross profit of his farm.

Said petitioner refers in his argument to his struggle to save the loss of the farm. Again we call the court's attention that this is not a foreclosure of a farm mortgage but a mortgage on town business property which was inherited by the petitioner, and as stated by the Honorable A. K. Gardner in his opinion:

> "The facts in this case present an unusual situation. There is no deficiency judgment against the debtor, as he did not sign either the note or the mortgage. Appellee claims no lien on the 140-acre farm as against appellant, or his rights therein."

The Federal Court is one of limited jurisdiction, and the petitioner must be a farmer to invoke the jurisdiction of the court. If he is not a farmer, he does not come within the purview of Section 75, or any of the sub-sections thereof.

The facts and the law are correctly stated in the opinion in this action in the Circuit Court of Appeals, and the Writ of Certiorari asked for should be denied.

Respectfully submitted,

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